IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 23 of 1989

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMABHAI ORGHADBHAI PATEL - Appellant(s)
Versus
MOHANBHAI MEGHABHAI PATEL - Defendant(s)

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Appearance :
MR DM THAKKAR for Appellant(s) : 1,
MR HP RAVAL for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 22/02/2007

ORAL JUDGMENT

1. Mr. D.M. Thakkar, learned counsel for the appellant; Mr. Harin P.Raval,learned counsel for the respondent.

2. The present appeal has been admitted for hearing the parties on the following substantial question of law:-

   “Whether the Court below erred in granting relief to the respondent without any issue and adjudication to that effect?”

3. The plaintiff had filed the suit for declaration and permanent injunction, seeking an order of injunction against the defendant from making any construction of “Dela” on the public road at the dead end side and thereby blocking the right to park the bullock cart or taking turn of the cart. It was submitted by the plaintiff that the defendant was unauthorizedly making construction and by such construction he was causing hindrance in the rights of the plaintiff. The defendant appeared before the Court and submitted that he being the owner was entitled to raise the construction and in fact, the plaintiff had no right to place his agricultural equipments or park his bullock-cart on the

road. After casting the issues, the learned trial court allowed the parties to lead evidence, the parties accordingly led the evidence. The learned trial court, after hearing the parties held that the issues no. 1 to 4 were not proved by the plaintiff, but however, he could successfully prove issues no. 6,7 and 8. The learned trial court accordingly dismissed the suit. Being dissatisfied by the said order, the plaintiff preferred an appeal which was finally disposed of by the first appellate court. Learned first appellate court held that the land in dispute was a common passage, the plaintiff had no right to put agricultural implements or other articles in the common passage and the defendant also had no right to construct a wall in the common passage. Learned appellate court accordingly injuncted the plaintiff from putting his agricultural implements on the common passage and granted mandatory injunction against the defendant requiring him to demolish any construction raised by him in the common passage, within a

period of 90 days. Against the injunction granted against the plaintiff, the plaintiff has not filed any appeal, therefore, that part of the order stands confirmed. The defendant has filed this appeal submitting inter alia that the learned court below erred in not appreciating that the defendant was entitled to raise construction on the land. Shri Thakkar, learned counsel for the defendant submits that from the evidence, it would clearly appear that the defendant was entitled to raise construction and the court below was not justified in granting mandatory injunction against the plaintiff. Shri Raval, learned counsel for the plaintiff, on the other hand, submits that in view of the admissions made by the defendant and pursis/application filed by the defendant that if any construction is raised by him, he will demolish the same, the defendant at this stage cannot be allowed to say that he has right to raise construction on the public street or common passage.

4. After hearing the parties and on going through

the records, I must hold that the defendant has failed in proving that the land belonged to him or he was exclusive owner. From his admissions, it would clearly appear that the land was used as common passage and that in the common passage he has raised certain construction. It is also clear from the records that the defendant had submitted an application that if any construction has been raised in the common passage, then he shall remove the same. If these admissions made by the defendant are taken into consideration, then, it would not be possible for this Court to hold that the land belongs to the defendant and he has right to make construction over it. Once it is accepted and held that the land is common passage, then any person who has a right to use common passage would not be entitled to make any construction over it because such construction would cause interference in exercise of the rights of other persons.

5. Taking into consideration the evidence available on the records, I am unable to hold that the

two courts below were unjustified in granting relief in favour of the plaintiff. In fact, the parties knew the issue and contested the same on merits. The appeal is dismissed. No costs.

6. Let a decree be framed accordingly.

[R.S. GARG, J.]

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